in small dark grocers' shops where large quantities of goods are crowded in a disorderly manner into a very small space", there is, in my view, no reason to dissent from the trial judge's finding that the get-up of the appellant's goods would not lead to confusion with those of the respondent.

Nor is there anything in the evidence which would lead me to doubt the validity of that conclusion.

The only witness who purported to say he had been misled in any way was a Malay barber from Degong He said that for four or five years he had bought from a shop in his village what he called "red fish" tea which he now knows to be the respondent's tea but that after a while the tea which he bought from the same shop seemed to be of poorer quality. He made no complaint to the shop from which he bought the tea but he did mention it to a Chinese whom he saw driving a van and selling tea who by a curious coincidence turned out to be the respondent and he showed him a packet of what he had been buying which was the appellant's tea. He admitted that he had never even glanced at the packets of tea he got from the local shop and that even if he were shown it he would be unable to identify a packet of the tea he had bought.

Then there was the evidence of the two grocers, called as witnesses by the respondent, which made a very powerful impression on the trial judge. Their evidence has to be read in the light of the fact that they both admitted that the wholesale price of the appellant's tea was cheaper than that of the respondent's tea and that therefore it was more a profitable article to sell. Neither of them was deceived in any way or was in any doubt as to which tea was which. What their evidence reduced itself to was this that when regular customers knew of the existence of several brands of tea and asked for a particular brand they gave them the brand for which they asked but if a customer who was not a regular customer only asked for "red fish tea" they gave him the appellant's tea without informing him that there was another sort of tea which could be described as red fish brand.

Now it is of course true that these wicked grocers were practising a deceit upon their more gullible or less discriminating customers. There is, however, nothing to show this was in any way facilitated by the get-up of the appellant's tea. There is no evidence that the customers upon whom the deceit was practised being given any opportunity of seeing the two brands of tea side by side or even that the shopkeepers had any other brand in stock. The evidence simply was that these unscrupulous grocers concealed the existence of tea of what they thought was better quality so that they could sell tea which might be poorer quality but which they could sell at a greater profit to themselves. It is difficult to see any distinction between them and the hypothetical wicked barmen who sought to dilute their customers' whisky with the soda water of Mrs. Gibbons rather than that of Messrs. Schweppes. Their conduct may have been reprehensible; it may have been fraudulent; but as was said by Lord Macnaghten in the case of *Payton & Co. Ltd.* v. *Snelling, Lampard & Co. Ltd.*,[4] another case where the facts were similar to those of the present case except that what was involved was tins of coffee and not packets of tea:—

"for fraud of that kind the defendants are not responsible."

I would allow the appeal and set aside the order made in the court below.

Barakbah C.J. (Malaya) and Tan Ah Tah F.J. concurred.

Appeal allowed.

Solicitors: *L. A. J. Smith; S. M. Yong & Co.*

KUAN HIP PENG v. YAP YIN & ANOR.

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Tan Ah Tah F.J.) December 15, 1964]

[K.L. — Federal Court Civil Appeal No. 68 of 1964]

Practice and Procedure — Striking out writ — Writ issued after expiry of period of limitation — Limitation absolute and without exceptions — Whether order can be made — Civil Law Ordinance, 1956, s. 7(5) — R.S.C. 1957, O. 25 r. 4.

The plaintiff-appellant suing by his next friend claimed compensation under the Civil Law Ordinance for loss arising from the death of his father as a result of the alleged negligent driving of a motor vehicle owned by the first respondent and driven by the second respondent. The writ was issued four days after the expiry of the period of three years prescribed in section 7(5) of the Ordinance. No defence was filed but the respondents applied by summons for the writ to be struck out under O. 25 r. 4 on the ground that the claim endorsed on it was frivolous and vexatious and an abuse of the process of the court. The trial judge made an order dismissing the suit and the appellant appealed. The grounds of appeal were that the application to strike out was premature as it was made before the defence was filed and in particular that no such order should have been made on the application of a defendant who wished to take advantage of a statute of limitations.

Held: (1) there is nothing in the wording of O. 25 r. 4 to show that a defendant who wishes to proceed under it must first file his defence;

(2) the rule that where there are exceptions which would affect the operation of a statute of limitations a plaintiff need not plead them until the defence of limitation has been raised on the pleadings by the defendant does not apply where the statute is absolute and without exceptions;

(3) the provisions of section 7(5) of the Civil Law Ordinance are absolute and contain no exceptions or saving provisions as in the Limitation Ordinance, and therefore the order to strike out the writ could be made before the defence was filed.

Cases referred to:—

(1) *Hubbuck & Sons Ltd.* v. *Wilkinson, Heywood and Clark Ltd.* [1889] 1 Q.B. 86, 91.

(2) *Gilleghan* v. *Minister for Health* [1932] 1 Ch. 86.

(3) *Attorney-General of the Duchy of Lancaster* v. *London and North Western Rly. Co.* [1892] 3 Ch. 274.

(4) *Dismore* v. *Milton* [1938] 3 All E.R. 762.

(5) *Stile* v. *Finch* (1634) Cro. Car. 381.

(6) *Hawkings* v. *Billhead* (1635) Cro. Car. 404.

(7) *Wakelee* v. *Davis* (1876) 25 W.R. 60.

(8) *Dawkins* v. *Penrhyn (Lord)* (1878) 4 App. Cas. 51, 59.

(9) *Busch* v. *Stevens* [1963] 1 Q.B. 1.

(10) *Lubovsky* v. *Snelling* [1944] 1 K.B. 44, 47.

(11) *Seward* v. *"Vera Cruz"* (1884-5) 10 App. Cas. 59, 67, 70.

(12) *Kellaway* v. *Bury* 66 L.T. 559, 602.

FEDERAL COURT.

F. Keith Sellar for the appellant.

N. Ramachandran for the respondents.

Cur. Adv. Vult.

Thomson L.P.: The plaintiff in these proceedings is an infant suing by his next friend and he is claiming compensation under section 7 of the Civil Law Ordinance for loss arising from the death of his father as a result of the alleged negligent driving of a motor vehicle owned by the first defendant and driven by the second defendant. The alleged negligent driving occurred on 22nd November, 1960, and the plaintiff's father died on 23rd November, 1960.

The writ (with statement of claim endorsed) was issued on 27th November, 1963, that is four days after the expiration of the period of three years mentioned in sub-section (5) of section 7 of the Civil Law Ordinance which reads as follows (the italics are mine) :—

"Not more than one action shall be brought for and in respect of the same subject matter of complaint, and *every such action shall be brought within three years after the death of such deceased person.*"

No defence was filed but on 27th January, 1964, the defendants took out a summons under Order 25 rule 4 for an order that all further proceedings in the action be stayed and that the writ be struck out on the ground that the claim endorsed on it was frivolous and vexatious and an abuse of the process of the court. The basis of the application is thus stated in the supporting affidavit:—

"The action commenced by the Writ of Summons herein must necessarily fail because it was not brought within three years after the death of the deceased person in question."

The application came before Hashim J. who adjourned it into open court for hearing and in the event made an order that "the plaintiff's suit be dismissed".

Against that decision the plaintiff has now appealed.

The grounds of appeal may be summarised as being that the application to strike out was premature because it was made before a defence was filed and that, in particular, no such order should have been made on the application of a defendant who wished to take advantage of a statute of limitation.

As regards the first of these grounds the application was made under Order 25 rule 4 which reads as follows:—

"The Court or a Judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court of a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

The power under this rule is separate and distinct from the power under rule 2 of the same order. As was said by Lindley M.R. in the case of *Hubbuck & Sons. Ltd.* v. *Wilkinson, Heywood & Clark, Ltd.*:—(1)

"Two courses are open to a defendant who wishes to raise the question whether, assuming a statement of claim to be proved, it entitles the plaintiff to relief. One method is to raise the question of law as directed by Order XXV., r. 2; the other is to apply to strike out the statement of claim under Order XXV., r. 4."

There is nothing in the wording of the rule to show that a defendant who wishes to proceed under it must first file his defence before he can do so and *Gilleghan* v. *Minister of Health* (2) is a case where a successful application was made by a defendant under the corresponding English rule before a defence had been filed.

Some forty years earlier the point was considered by the English Court of Appeal in the case of *Attorney-General of the Duchy of Lancaster* v. *London and North Western Railway Co.*(3) which was a case under the corresponding rule of the Chancery of Lancaster Rules, 1884.

The Vice-Chancellor had held that he had no jurisdiction to strike out the statement of claim or stay the action under the rule. His grounds were that no defence had been filed and that the action was not on the face of the statement of claim frivolous or vexatious but raised an important point of law. An appeal was dismissed on the ground that an important and difficult question of law was involved. Lindley L.J., however, said (at p. 276) that "it is possible that the Vice-Chancellor may have expressed himself too strongly in saying that there was no jurisdiction". Lopes L.J. said (at p. 277) :—

"The Vice-Chancellor may in what he said have gone somewhat too far when he held that he had no jurisdiction."

And A. L. Smith L.J. said this (at p. 278) :—

"If the Vice-Chancellor had founded his judgment upon the fact that he could not act under Order XXV., rules 2, 3 and 4, unless there were pleadings further than the statement of claim, I should have thought he had gone wrong."

So much for the appellant's contention that the court had no power to consider an application by the defendants before a defence was filed.

I pass now to the appellant's contention that no order should have been made because a question of limitation was involved. That was based on the case of *Dismore* v. *Milton*.[4]

In that case the Court of Appeal held that under Order XXV rule 4 of the English Rules of 1883 where it appeared from a statement of claim that the plaintiff's cause of action arose at a time before the period prescribed by the Statute of Limitations it was not open to the defendant to have the statement of claim struck out on the ground of disclosing no cause of action, except in cases to which the Real Property Limitation Acts apply.

It is, however, important to note that this restriction on the exercise of powers contained in the rule only applies where the action was affected by the Statute of Limitations and it is equally of importance to observe the reasons for it.

In the case of *Stile* v. *Finch*,[5] which was decided in 1634, that is only 11 years after the enactment of the Statute of Limitations, the Court of Common Pleas held that the statute must be pleaded and could not be taken advantage of on motion. Jones and Berkley JJ. held on a motion for arrest of judgment that:—

"the plaintiff ought to have judgment, because the defendant hath not pleaded the statute: for there may be divers causes, that he could not bring the action before this time, viz. that he was in prison, or within age, or beyond seas, or that he had sued the defendant to outlawry, and the defendant had reversed the outlawry, and this action brought within a year after the reversing of the outlawry (as in truth the case was): for then the action is well brought."

The following year much the same thing was said in the case of *Hawkings* v. *Billhead*,[6] though in this case, as was later noted by Greer L.J., Sir George Croke dissented from the judgment of the majority of the Court.

Then in the case of *Wakelee* v. *Davis*,[7] which was decided in 1876, that is to say subsequent to the abolition of special demurrers by the Common Law Procedure Act, 1852, but prior to the abolition of general demurrers by the 1883 Rules, it was held that the Statute of Limitations must be pleaded and could not be raised by demurrer.

That brings us to *Dismore* v. *Milton*. That case was an action for slander, and on the face of the statement of claim some of the alleged slanderous statements had been uttered more than two years before the issue of the writ. On an application by summons under Order XXV rule 4 it had been ordered that so much of the statement of claim as referred to these alleged slanderous statements should be struck out. The order, however, was set aside by the Court of Appeal. Greer L.J. said the law had been settled ever since the cases of *Stile* v. *Finch*, *supra*, and *Hawkings* v. *Billhead*, *supra*, to be as follows (p. 763) :—

"Where it appears from the statement of claim that the plaintiff's cause of action arose at a time before the period prescribed by the Statute of Limitations, it is not possible for the defendant to have the statement of claim struck out on the ground that it discloses no cause of action, except in cases where the Real Property Limitation Acts apply."

He went on to say:—

"The reason for this is sound. It is because a plaintiff may be able to show that he is entitled to bring his action, notwithstanding the expiration of the statutory period, by reason of one of the exceptions contained in the Limitation Act, 1623, s. 7. When the cause of action arose, he may have been an infant or *non compos mentis*."

Slesser L.J. agreed. He explained the position regarding limitation under the Real Property Limitation Acts by quoting the following passage from the judgment of Earl Cairns L.C. in the case of *Dawkins* v. *Penrhyn* (*Lord*) :—[8]

"The plaintiff has to state his title, the title upon which he means to rely, and the Statute of Limitations with regard to real property says that when the time has expired within which an entry or a claim must be made to real property, the title shall be extinguished and pass away from him who might have had it to the person who otherwise has the title by possession, or in whatever other way he may have it."

He then went on (p. 764) :—

"The Statute of Limitation is not absolute. By reason of the exceptions contained in sect. 7, it may be that a limitation which would otherwise apply will not apply, and, until the statute is pleaded, there is no opportunity for the plaintiff to raise the point that the statute does not apply by reason of one of the exceptions in sect. 7."

Now, it is clear from the general course of reasoning upon which it is based and from the reference to the Real Property Limitation Acts that the case of *Dismore* v. *Milton*, *supra*, has no application in relation to a Staute of Limitations which is absolute and without exceptions.

Where there are exceptions which would affect the operation of the statute it is clear that a plaintiff need not plead them until the defence of limitation has been raised on the pleadings by the defendant (see *Dawkins* v. *Penrhyn*, *supra*; *Busch* v. *Stevens* [9]).

But that is not the position in the present

case. The terms of section 7(5) of the Civil Law Ordinance are absolute and contain no exceptions. They are that "such action shall be brought within three years after the death of the deceased person". It is true that, as Goddard L.J. said with reference to the corresponding section of the English Act, the section "merely prescribes a period of limitation" (*Lubovsky* v. *Snelling* [10]) and that it does not contain a condition precedent or anything of the sort. Nevertheless the period is absolute. There is no room for doubt as to when it begins to run. It runs from the death of the person of whose support the plaintiff has been deprived. The cause of action arises on death (see *Seward* v. *"Vera Cruz"* [11]). There are none of the saving provisions in favour of a plaintiff that were found in the Statute of James I and are to be found to-day in the English Limitation Act of 1939 or our own Limitation Ordinance of 1953. There is no question of infancy or disability or anything of the sort or of acknowledgment. The only way in which the consequences of the section could be avoided would be if there had been some agreement not to plead the statute and this would constitute a new cause of action (*Lubovsky* v. *Snelling, supra*) and would require to be set out in the statement of claim.

Finally, there can be no question of importing into the matter any of the saving provisions of the Limitation Ordinance by any process of construction for by section 3 of that Ordinance it "shall not apply to any action....for which a period of limitation is prescribed by any other written law."

It is true that an application such as was made in the present case must be most carefully scrutinised and the powers of the court under Order 25 rule 4 must be exercised with the greatest care. As was said by Lindley L.J. in the case of *Kellaway* v. *Bury*:—[12]

"That is a very strong power, and should only be exercised in cases which are clear and beyond all doubt. It is not because the statement of claim is demurrable from a pleader's point of view that the court is justified in stamping the action out. It must be only be demurrable, but the court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendment."

Nevertheless in my view the present case was a proper case for the exercise of these powers. Counsel has suggested no ground on which the consequences of limitation could be avoided. I trust it is not unkind to suppose that what his argument amounted to was that he was entitled to time to think of something. For myself I have been able to think of nothing and can see no grounds for supposing that any prolongation of counsels' intellectual labours would produce a more substantial result.

I would dismiss the appeal with costs.

Barakbah C.J. (Malaya) and Tan Ah Tah F.J. concurred.

Appeal dismissed.

Solicitors: *Sault, Keith Sellar & Co.; N. Ramachandran.*

COMPTROLLER OF INCOME TAX v. YAN TAI MIN

[O.C.J. (Ali J.) December 16, 1964]

[Ipoh — Perak Civil Suit No. 30 of 1964]

Probate and Administration — Grant of letters of administration — Whether order granting person administration makes him an administrator with power to sue and be sued — R.S.C. 1957, O. 16 rr. 8 and 16 — Probate and Administration Ordinance, 1959.

In this case the defendant who had entered conditional appearance applied to strike out the writ of summons on the ground that the action brought against him as administrator was incompetent. The defendant had obtained an order for the grant of letters of administration to him of the estate of Yan Koon Wing deceased but he had not extracted the grant.

Held: it is only on extracting the grant of a letter of administration that a person can be said to be duly clothed with a representative character and to have acquired a title to the estate so as to make him an administrator within the meaning of O. 16 r. 8 of the Rules of the Supreme Court and therefore in this case the defendant was not the administrator and the action could not be brought against him as administrator.

Cases referred to:—

(1) *Chia Teck Liang* v. *Tan Soo Khiang* [1936] M.L.J. 185.

(2) *P. Govindasamy Pillay & Sons Ltd.* v. *Lok Seng Chai* [1961] M.L.J. 89.

(3) *Ingall* v. *Moran* [1944] 1 K.B. 160.

MOTION.

Au Ah Wah (Federal Counsel) for the plaintiff.

M. Mahalingam for the defendant.

Ali J.: In this notice of motion, which was filed on the 17th August, 1964, the defendant, who had entered conditional appearance to the writ, applies to strike out the writ of summons on the ground that the action brought against him as administrator was incompetent.

It was common ground that in Petition No. 182 of 1961 the defendant applied for the grant of administration and on the 18th October, 1961, obtained an order for the grant of administration to him of the estate of Yan Koon Wing, deceased. But up to the date of the writ he had not extracted letters of administration. It is the defence contention that the defendant is not the administrator of the estate until he has been issued with letters of administration. This raises the question whether the order granting him administration dated the 18th October, 1961, was sufficient to render the action by the